SUPREME COURT, U. S.

APR 17 196

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1286~~ 94

LEONARD ROYALL AIKEN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LEONARD ROYALL AIKEN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Leonard Royall Aiken prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 17, 1967.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix A hereto, *infra* p. 2a, is unreported at the present.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 17, 1967, Appendix A, p. 2a, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is a violation of a defendant's rights under the Fifth and Sixth amendments to the United States Constitution to allow a government witness to invoke the fifth amendment and refuse to answer questions on cross-examination after giving extensive and damaging testimony on direct examination?

2. Whether an accused in a federal criminal proceeding who demands a preliminary hearing is entitled to such a hearing, and if the point is timely pressed, whether a denial of that hearing can be excused by an intervening grand jury indictment?

3. Whether the trial court has an affirmative duty to instruct the jury in a non-technical, understandable way the meaning of the presumption mentioned in 21 U.S.C. §174 rather than simply reading the statutory language without explanation?

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. Amend VI.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty or property, without due process of law . . . U.S. Const. Amend. V.

Statutes Involved

Title 21, Section 173, United States Code

§173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*— It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

TITLE 21, SECTION 174, UNITED STATES CODE

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satifaction of the jury.

Rule 5. Proceedings Before the Commissioner.

(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) PRELIMINARY EXAMINATION. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him. (As amended Feb. 28, 1966, eff. July 1, 1966.)

STATEMENT OF THE CASE

The petitioner was the subject of one count of a nine-count indictment filed in the Southern District of New York on the 12th day of December, 1964, charging various defendants with substantive and conspiratorial violations of

21 U.S.C., §§173, 174. Petitioner was convicted under the first count of the indictment charging that:

> 1. On or about the 1st day of November, 1962, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, LEONARD R. AIKEN, WEBSTER BIVENS, CHARLES COLE, LEROY DAVIS, GEORGE HENDERSON, NOLAN JOHNSON, CLIFFORD ROGERS, RONALD SCOTT and RAYMOND SPRATLEY, the defendants, and others to the Grand Jury unknown unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code.
>
> 2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law, in violation of Sections 173 and 174 of Title 21, United States Code.

On appeal the petitioner, then appellant, raised questions concerning (a) the impropriety of the court's charge under the "presumption" provision of the statute, (b) the government's witnesses refusal to answer on cross-examination, and (c) the violation of appellant's rights under Rule 5, Federal Rules of Criminal Procedure in that the government obviously and deliberately denied him his right to a preliminary hearing despite repeated requests for the hearing. The Court of Appeals for the Second Circuit affirmed the conviction.

Before the indictment had been returned, but after the complaint was filed, (Apx. 86a, R. —) petitioner appeared

with counsel before the United States Commissioner. The complaint charged in exactly the same words the offense later incorporated into count one of the indictment. The complaint was sworn to by the complainant (Agent Selvaggi) in the presence of petitioner and his counsel before the commissioner. (Apx. 87a, R. —). Petitioner demanded an immediate hearing, (Apx. 88a *et seq.*, R. —) but was denied the hearing and released on $20,000.00 bail. (Apx. 96a, R. —). The petitioner had appeared voluntarily at the office of the Assistant United States Attorney when no arrest warrant was outstanding, his attorney was excluded and interrogation by the Assistant United States Attorney was conducted in camera despite the protests of petitioner's counsel. (Apx. 92a, 93a, R. —). In opposing an immediate hearing the Assistant United States Attorney said he would not be ready to go ahead with the hearing for at least a week, but admitted:

> The Commissioner: Well, I mean, you might be able to get it before the Grand Jury.
> Mr. Tendy: That is possible, too, but I don't want to mislead you. I think probably we can. (Apx. 95a, R. —).

Upon the return of all parties before the Commissioner upon the date requested by the prosecutor, the petitioner immediately began renewing his request for an immediate hearing and opportunity to "cross-examine the agents involved here." (Apx. 98a, R. —). The government's response:

> Mr. Dobbs: The government at this time requests an adjournment until November 23rd in the case involving the defendant Aiken. The case was just recently assigned to me to prosecute. I am not fully familiar with the facts or the pattern of evidence involved. It will require a two-week delay to enable the government to fully prepare its case. (Apx. 93a, R. —).

The petitioner contended that a further adjournment abridged his right to constitutional due process, and his

rights under Rule 5, to know why he was being held and the evidence against him. (Apx. 99a, R. —). The Commissioner responded that this was a matter that could be raised "at a later date when the matter is brought to trial." (Apx. 100a, R. —). Subsequently petitioner was indicted without being afforded a preliminary hearing. He raised the point upon appeal but was unsuccessful upon the court's holding that the supervening indictment mooted the absence of a preliminary hearing.

The evidence at trial was composed primarily of the testimony of alleged accomplices who were under threat of conviction and punishment themselves—witnesses who had not been disclosed to the defendant prior to the receipt of their testimony despite the defendants unsuccessful effort to secure a bill of particulars before trial and a list of witnesses at the beginning of trial. One of these key witnesses testified on direct but then on cross-examination repeatedly exercised his privilege against self-incrimination or simply refused to answer. The government contended that in bringing forth the background of the witness the defendant should be limited to asking whether any charges were pending but "why do you have to go into the facts." (Tr. 3074, R. —). "I submit they are trying to drag in the facts to create an image in the jury's mind." *Ibid.* Defense counsel responded by pointing out that the government had brought out the witness's military background, marriage, and other matters reflecting credibility and that the other facts should also be presented. (Tr. 3074, R. —). Thereafter defense counsel attempted repeatedly without success to ask the witness whether he had been beaten by the police, whether he had cooperated in return for the police letting his wife go, and similar matters. These were all successfully resisted by the claim of the privilege against self-incrimination. The court's interpretation of the privilege is set forth clearly,

THE COURT: Well, I think the Supreme Court has

> said many times that we can't tell which direction you go from an answer better than the defendant can; he is the judge of whether or not it will incriminate him, and unless he gets into an area where it is so ridiculous that it isn't even funny, then of course I will exercise my discretion to order him. . . . (Tr. 3073, R. —).

The many matters about which the witness was permitted to remain silent will not be set forth here in the interests of brevity. The above is illustrative.

Upon the conclusion of the case, the court instructed jury with respect to possession as follows:

> Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction *unless the defendant explains* the possession to the satisfaction of the Jury. (Tr. 3290, R. —). (Emphasis added.)

No defendant had testified during the trial. The court did not further explain the difference between an inference and a presumption nor did it further explain or elaborate upon the defendant's manner of explanation or duty to explain.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the interpretations of this Court concerning an accused's right to confront the witnesses against him and to cross-examine them. Following the government's establishment of the critical witness's military record, marriage and other matters, it was violative of the right of confrontation and cross-examination to prohibit the defense from inquiring into the *facts* supporting the contention that (a) the witness had been coerced by beating and (b) induced by promises to let his wife go, and (c) to place the witness in his proper setting in the community. *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Alford* v. *United States*, 282 U.S. 687 (1931); *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937). The critical na-

ture of the witness's testimony coupled with the absence of any prior notice of his testimony makes the prejudice particularly harmful to preparation and presentation of a defense.

2. The decision below is in direct conflict with the decisions of the Court of Appeals for the District of Columbia Circuit concerning the function of a preliminary hearing and violates the fundamental right of an accused to know the nature and cause of the accusation against him as soon as the complaint has been brought.

The decision below rendered on February 20, 1967, is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit rendered January 23, 1967, in *Ross* v. *United States*, No. 20,535. As *Ross* reaffirmed the District of Columbia Circuit position that the function of a Rule 5 preliminary hearing includes affording the defendant ". . . (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him." *Id.* at 3 of the slip opinion, quoting from *Blue* v. *United States*, 119 U.S. App. D.C. 315, 322, 242 F.2d 894, 901 (1964), *cert. denied* 380 U.S. 944 (1965), and further held that a supervening indictment did not render the issue moot. The Circuits are in hopeless conflict. The opinion in the instant case reaffirmed the Second Circuit position in *United States* v. *Heap*, 345 F.2d 170 (1965) that the only purpose of the preliminary hearing is to determine probable cause and that function *is* rendered moot by the indictment.

The factual circumstances of the instant case render it peculiarly appropriate to resolve the conflict between the circuits. The issue is clearly presented. The defendant on two occasions appeared before the United States Commissioner for his preliminary hearing. On both occasions the federal agents who had sworn to the warrant before the

commissioner were present, bail was fixed, the Assistant United States Attorney and the stenographer were present. Defense counsel strenuously demanded an immediate preliminary hearing on both occasions. The government requested a delay on the grounds that it was not prepared to present its evidence while frankly acknowledging that it might be able to present the same matter to the grand jury before the adjourned date for the preliminary hearing. The adjournments took over a month and the government secured its indictment without submitting to a preliminary hearing. The supervening indictment merely sets forth in cursory form the same statutory language contained in the original complaint. The defendant's motion for a bill of particulars was denied; a crucial surprise witness was utilized despite the defense request at the beginning of trial for the names of all government witnesses to be used against them; the evidence consisted largely of testimony from alleged accomplices. In short, the defendant was convicted of the crime of conspiracy in a trial where the government successfully prevented him from utilizing proper means of discovering the case against him and preparing his defense. On the one hand the interpretation of Rule 5 of the Federal Rules of Criminal Procedure is at issue. On the other the elements of due process pursuant to the fifth amendment and the requirements of the sixth amendment that the accused be informed of the nature and cause of the charges against him are presented.

As to the Rule 5 issue, the government has acknowledged its substantiality by petitioning for certiorari in *Blue, supra, (cert. denied)* and petitioning for a rehearing *en banc,* in *Ross, supra.* The petition for rehearing *en banc* in the *Ross* case was denied March 24, 1967, and the government is now considering whether to petition this Court for review of that decision.

3. The court's instruction below that the possession of

narcotic drugs is deemed sufficient evidence to authorize conviction unless a defendant explains the possession is in conflict with the petitioner's privilege against self-incrimination and his right to a correct instruction of the statute. The language used by the court constitutes a commentary upon the defendant's failure to take the stand and explain his possession, constructive or action in violation with the principle articulated by this Court in *Griffin* v. *California*, 380 U.S. 609 (1965). The failure to clarify the nature of the inference permissible and the obligation of the defendant to explain is in conflict with this Court's decision in *United States* v. *Gainey*, 380 U.S. 63 (1965).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A PETITION FOR REHEARING BELOW DENIED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Respondent,

v.

LEONARD ROYALL AIKEN,
Defendant-Appellant.

PETITION FOR REHEARING; MOTION FOR STAY OF THE MANDATE AND CONTINUANCE OF BAIL

JAMES J. HANRAHAN, New York, N. Y.,
for defendant-appellant.

Motion to stay mandate denied. Petition denied. Bail denied.

J.E.L.
H.J.F.
P.R.H.
U.S.C.J.J.

Mar. 17, 1967.

Apx. 2

OPINION BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 264—September Term, 1966.

(Argued January 6, 1967 Decided February 20, 1967.)

Docket No. 30792

UNITED STATES OF AMERICA,
Appellee,

v.

LEONARD AIKEN, CHARLES COLE, LEROY DAVIS and CLIFFORD ROGERS,
Appellants.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and HAYS, *Circuit Judges.*

Appellants Cole and Davis appeal from convictions for violating 21 U. S. C. §§173, 174, and appellants Aiken, Davis, and Rogers from convictions for conspiring to violate 21 U. S. C. §§173, 174, after a trial before John M. Cannella, *J.*, and a jury in the United States District Court for the Southern District of New York.

Affirmed.

ROBERT G. MORVILLO, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Stephen F. Williams and John E. Sprizzo, Assistant United States Attorneys, New York, N. Y., on the brief); *for appellee.*

JAMES J. HANRAHAN, New York, N. Y., *for appellant Leonard Aiken.*

THEODORE KRIEGER, New York, N. Y. (William C. Chance, Jr., New York, N. Y., on the brief), *for appellant Charles Cole.*

JOHN R. SANDERS, New York, N. Y., *for appellant Leroy Davis.*

IRWIN KLEIN, New York, N. Y., *for appellant Clifford Rogers.*

LUMBARD, *Chief Judge:*

The appellants Leonard Aiken, Leroy Davis, and Clifford Rogers were convicted after a lengthy trial before Judge Cannella and a jury in the Southern District of New York of conspiracy to violate 42 Stat. 596 (1922), as amended, 21 U. S. C. §173, and 70 Sat. 570 (1956), 21 U. S. C. §174, prohibiting the knowing receipt, concealment, or sale of any narcotic drug illegally imported into the United States. Appellant Davis was also convicted on two counts charging substantive violations of 21 U. S. C. §§173, 174. The appellant Charles Cole, as to whom the conspiracy count was dismissed at the close of the trial, was convicted of substantive violations on two other counts. Appellant Aiken was sentenced to 25 years imprisonment and a $20,000 fine, Cole to 10 years and a $10,000 fine, Davis to 15

years and a $25,000 fine, and Rogers to 6 years and a $5,000 fine.[1]

The evidence at trial, most of it by accomplices, viewed most favorably to the government as it must be upon appeal from convictions, showed that appellant Aiken was the head and appellant Davis the second in command of an organization engaged in large-scale distribution of narcotics in New York City during 1963 and 1964. One Edward Walker testified that between January and March 1963 he helped Davis pick up two foot lockers of narcotics in the Bronx while Aiken maintained surveillance, several times helped Aiken or Davis deliver narcotics, and on Aiken's instructions carried narcotics given him by Davis to an apartment in Chicago. Henderson, one of the severed defendants, testified that he approached Aiken in March 1963 to buy narcotics and was introduced to Davis, who sold him some narcotics and then introduced him to the defendant Bivens, who sold him narcotics through the summer of 1963. In September 1963, Henderson stated, he bought a half ounce of heroin from Davis and resold it to an individual who turned out to be an undercover agent of the Bureau of Narcotics. This testimony was corroborated by the agent, who saw Henderson meet Davis at a bar on Eighth Avenue, leave with him for a few minutes, and return with the heroin, and formed the basis for Davis' conviction on count 2. Henderson continued to obtain narcotics from Aiken and Davis through early 1964.

Spratley, another severed defendant, testified that he purchased narcotics from Davis on three occasions between March and May 1964, the last of which was charged in

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[1] The defendant Webster Bivens, whose appeal is pending, was convicted on the conspiracy count and of two substantive violations, and the defendant Nolan Johnson was acquitted on the conspiracy count. The remaining defendants, George Henderson, Ronald Scott, and Raymond Spratley, each charged with conspiracy and a substantive violation, were severed and testified for the government.

count 5, of which Davis was convicted. Scott, the third severed defendant, testified that in May 1964 he applied to Aiken "to deal in some narcotics," was given some money and introduced to Davis, and after two months received some narcotics from Davis. A few days later, just after arranging to sell an undercover agent over a half kilo of heroin to be obtained from Davis, Scott was arrested. None of the defendants testified, but they called witnesses to attack the accomplices' credibility and Scott's account of receiving money from Aiken.

The evidence linking appellant Rogers to the conspiracy was furnished by one witness, John Shands. Shands arrived in New York City in April 1964, and began to deliver narcotics and collect "approximately $150" for Rogers two or three times a week. In July 1964 Rogers entered a bar on Amsterdam Avenue with a bag, emerged without it, and went with Shands to a bar on St. Nicholas Avenue where they met Davis, who told them that a package of narcotics (which they later bagged and distributed) was hidden over the sun visor of their car. In September 1964, after Rogers told Shands that he was going to obtain narcotics that night, they met Davis in a bar. Rogers tried on Davis' coat, and after leaving the bar removed a package of narcotics from his pocket. Shands also testified that on one occasion between April and October 1964 he diluted narcotics for Davis.

Most of the testimony regarding appellant Cole came from Henderson. Henderson purchased narcotics from Cole during April through August 1963. (As Judge Cannella noted in dismissing the conspiracy count against Cole, Henderson's testimony at this point was expected to link Cole to Aiken.) On April 15, 1964, Henderson, now acting as an informant, introduced Cole to an undercover agent, paid Cole $500 obtained from the agent, and was told to look under the steps at a named address, where the agent

found a package of heroin. This transaction and a similar one effected on April 23, 1964, both corroborated by the undercover agent and an observing agent, were the subject of the two substantive counts of which Cole was found guilty. Cole's defense was designed to suggest that Henderson himself planted the narcotics on both occasions.

We shall consider first the contentions, made or adopted by all appellants, that: (1) the witness Shands' assertion of his privilege against self-incrimination produced reversible error; (2) the witness Walker was improperly allowed to assert his privilege during cross-examination; (3) the trial court failed to explain the presumption of knowledge of illegal importation from proof of possession of a narcotic drug established by 21 U. S. C. §174; (4) the trial court failed to charge that the jury should acquit if it found multiple conspiracies; and (5) the charge erroneously defined reasonable doubt.

Appellant Cole also argues that the substantive counts against him should have been severed after dismissal of the conspiracy count as to him, and that he should have been allowed to reopen the case just before summations to present a fresh witness. Appellant Rogers urges that there was insufficient evidence to support his conviction on the conspiracy count.

I.

Appellants' first contention is that the government's calling and questioning of Shands led to reversible error. Shands asserted his privilege against self-incrimination twice during his first day of testimony, both times when asked what he delivered for Rogers, and to numerous questions he responded that he did not remember. On the next day of trial, he interposed his privilege to the first six questions asked. The government was granted a continuance, during which it requested and obtained immunity for

Shands under 70 Stat. 574 (1956), 18 U. S. C. §1406. Shands thereupon gave the responsive testimony that we have summarized, and was subjected to searching cross-examination.

Appellants argue that reversal is required both by the natural inference from Shands' assertion of the privilege, citing *United States* v. *Maloney,* 262 F. 2d 535 (2 Cir. 1959, and by the alleged fact that his hesitation made him appear afraid of them. But, as the Supreme Court stated in *Namet* v. *United States,* 373 U. S. 179, 186-87 (1963), a witness' assertion of his privilege has been held reversible error only where "the government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege," as in *United States* v. *Maloney, supra,* or where "a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination." See *Douglas* v. *Alabama,* 380 U. S. 415 (1965). Here the Assistant United State Attorney stated on the record that he had "no inkling" that Shands would invoke his privilege. Moreover, appellants were not prejudiced by inferences not subject to cross-examination, because after Shands received immunity he gave direct testimony against Rogers and Davis and was extensively cross-examined. Finally, any apparent fear of appellants on Shands' part seems quite immaterial in view of the fact that he did testify against appellants.

Appellants also complain that Walker was allowed to assert his privilege not to answer questions put to him on cross-examination regarding federal and state narcotics charges pending against him. As Walker had already admitted the pendency of the charges and a prior conviction, Judge Cannella did not abuse his discretion by sustaining these assertions of the privilege. *United States* v. *Kahn,* 366 F. 2d 259, 265 (2 Cir.), cert. denied, 35 U. S. L. Week

3174 (Nov. 15, 1966); *United States* v. *Irwin*, 354 F. 2d 192, 198 (2 Cir. 1965), cert. denied, 383 U. S. 967 (1966).

Appellant Aiken argues that the adjournment of his preliminary hearing for over a month, after which he was indicted, violated his rights. However, there is no showing that the adjournments improperly affected his ability to defend against the charges, and the indictment sufficed to establish probable cause for detention (or, in his case, requiring bail). *United States* v. *Heap*, 345 F. 2d 170 (2 Cir. 1965). The remaining contentions of appellants Aiken and Davis, except those directed at the trial court's charge, are frivolous.

Appellants' first attack on the court's charge is that after outlining the elements of illegal importation and knowledge by the defendants of illegal importation under 21 U. S. C. §174, the trial court read to the jury the paragraph of that section providing that possession of a narcotic drug "shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury," but did not go on to explain that "the jury, despite proof of possession, may find that one of those elements was lacking." *United States* v. *Evans*, 312 F. 2d 556 (2 Cir. 1963); see *United States* v. *Mont*, 306 F. 2d 412 (2 Cir.), cert. denied, 371 U. S. 935 (1962). When the Assistant United States Attorney suggested that such an explanation be added, the trial court stated that it was relying upon our intimation in *United States* v. *Davis*, 328 F. 2d 864 (2 Cir. 1964), that the language of the last sentence of section 174 may be read without elarification, 324 F. 2d 866. One defense counsel commented, "It's safer that way," and none of his colleagues made any objection.

Later after the trial of this case, we recommended in *United States* v. *Armone*, 363 F. 2d 385, 392 (2 Cir.), cert. denied, 35 U. S. L. Week 3186 (Nov. 22, 1966), following

the "better practice" suggested in *United States* v. *Gainey*, 380 U. S. 63, 71 n. 7 (1965), that the jury be told simply that it may infer the elements of the section 174 offense from proof of possession of a narcotic drug unless the evidence provides a satisfactory explanation of the possession, without any explicit reference to the language of the statute.

This does not mean that the trial court's failure to explain the inference permitted by §174 was such plain error, Fed. R. Crim. P. 52(b), as to require reversal despite the absence of objection at trial. We hold that it was not, especially as defense counsel failed to object after the point was specifically raised by the government, and also because the issue contested at trial was whether the appellants had dealt in narcotics at all, not whether the narcotics had to their knowledge been illegally imported. Cf. *United States* v. *Sorenson*, 330 F. 2d 1018 (2 Cir. 1964), cert. denied, 380 U. S. 945 (1965); *United States* v. *Davis*, *supra*. Compare *United States* v. *Llanes*, —— F. 2d —— (2 Cir. Feb. 7, 1967). Appellants' alternative contention that the reading of the sentence of §174 constituted comment on their failure to testify is without merit, since the trial court specifically charged that their failure to testify should not influence the jury's deliberations, and its reading of the statutory language without comment could not fairly be interpreted as an "allusion or innuendo based on [their] decision not to take the stand," *United States* v. *Gainey*, *supra* at 71. Cf. *United States v. Armone*, *supra* at 392-93; *Cloud* v. *United States*, 361 F. 2d 627 (8 Cir. 1966).

Appellants next claim as error the trial court's failure expressly to charge the jury that multiple conspiracies were not within the ambit of the indictment. The court in its charge twice stressed, however, that the government alleged a single conspiracy, and added that it must show that each defendant was "a knowing part of it." Thus the

jury could not have thought that it might convict if it found multiple conspiracies. In any case, appellants do not point out how they could have been prejudiced by the failure to give such an additional charge in view of the evidence before the jury. Cf., e.g., *United States* v. *Armone, supra* at 404; *United States* v. *Agueci*, 310 F. 2d 817, 827-28 (2 Cir. 1962), cert. denied sub nom. *Guippone* v. *United States*, 372 U. S. 959 (1963).

The trial judge charged that a reasonable doubt is "a doubt based on reason," "a substantial doubt and not a speculative doubt"; he concluded that "you must be satisfied of the defendant's guilt to a moral certainty before you can convict." This charge was not error. *United States* v. *Heap, supra; United States* v. *Davis, supra.*

The convictions of appellants and Aiken and Davis are accordingly affirmed.

II.

Appellant Cole contends that after dismissing the conspiracy count as to him Judge Cannella should of his own motion have severed the two substantive counts against him. The government first urges that this contention is foreclosed on appeal by Cole's failure to move for a severance under Fed. R. Crim. P. 14 after the dismissal of the conspiracy count. See generally, e.g., *Monroe* v. *United States*, 234 F. 2d 49, 57 (D. C. Cir.), cert. denied, 352 U. S. 872, 873 (1956); *United States* v. *Perl*, 210 F. 2d 457 (2 Cir. 1954); Orfield, Relief From Prejudicial Joinder in Federal Criminal Cases (Part II), 36 Notre Dame Law, 495, 499 (1961). We need not pass on this point, for the denial of a motion for a severance, had one been made, would not have been an abuse of discretion.

Where joinder was originally proper under Fed. R. Crim. P. 8(b), as it was here, a motion for severance after the

count justifying joinder (here the conspiracy count) is dismissed will not be granted unless the defendant was prejudiced by the joinder or the count dismissed was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial. E.g., *United States* v. *Schaffer,* 266 F. 2d 435, 440-41 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960). There has been no suggestion that the conspiracy count against Cole was pressed in bad faith.

Nor was Cole prejudiced by joinder. The testimony of Henderson and the agents, and Cole's defense, as to the two sales for which he was convicted presented sharp factual issues easily separated from the issues involving the other defendants. Moreover, Judge Cannella twice directed the jury to divorce the counts against Cole from the other issues, and he made the excellent suggestion that it consider those counts first. These limiting instructions adequately protected Cole from prejudice.[2] Cf., e.g., *United States* v. *Elgisser,* 334 F. 2d 103 (2 Cir.), cert. denied, 379 U. S. 879, 881 (1964); *United States* v. *Kaufman,* 311 F. 2d 695 (2 Cir. 1963). Cole argues that the greater likelihood of prejudice when the count justifying joinder is dismissed only as to one defendant requires severance, but we are not persuaded that our holding to the contrary in *United States* v. *Manfredi,* 275 F. 2d 588 (2 Cir.), cert. denied, 363 U. S. 828 (1960), should not be followed here.

Cole also argues that the trial court abused its discretion by refusing to reopen the case just before summations were to begin for the testimony of a witness who,

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[2] Cole's reliance upon *United States* v. *Bentvena,* 319 F. 2d 916, 955-56 (2 Cir.), cert. denied, 375 U. S. 940 (1963), in which three appellants' convictions on substantive counts were reversed after the evidence had been held insufficient on appeal to sustain their conviction on the conspiracy count, is misplaced. The majority observed that there was "far greater likelihood of prejudice" where the conspiracy count as to those defendants had been submitted to the jury, and explicitly distinguished *United States* v. *Schaffer, supra,* on this ground.

he said, had just been located and would tesify that Henderson had threatened to frame Cole and had suggested that the witness place narcotics in Cole's automobile. Although Cole's counsel stated that the witness could not be located "on the eve of the defense," he did not adequately account for his failure to locate her during the five weeks which elapsed between Henderson's direct testimony relating to Cole and the closing of the proofs. The denial of the motion to reopen was thus not an abuse of discretion. Cf., e.g., *United States* v. *Edwards,* 366 F. 2d 853, 873 (2 Cir. 1966); *United States* v. *Houlihan,* 332 F. 2d 8, 15 (2 Cir.), cert. denied, 379 U. S. 828 (1964).

For these reasons, we affirm Cole's conviction.

III.

Appellant Rogers' contention that there is insufficient evidence to sustain his conviction on the conspiracy count is based upon several cases in which this Court has held that "participation in a single isolated transaction [is] an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy." *United States* v. *Stromberg,* 268 F. 2d 256, 267 (2 Cir.), cert. denied, 361 U. S. 863, 868 (1959); *United States* v. *Reina,* 242 F. 2d 302, 306 (2 Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch,* 113 F. 2d 982 (2 Cir. 1940. The proof against Rogers, however, showed more than "a single isolated transaction"; it showed that Rogers was carrying on a steady traffic of considerable volume in narcotics during the summer of 1964, that he twice purchased sizeable quantities of narcotics from Davis, and that his employee Shands even diluted narcotics for Davis on one occasion. The jury could infer from these facts that Rogers was dependent upon the conspiracy for a sizeable and steady supply of narcotics, and that this dependence made him a member with an interest in advancing the conspiracy. Cf. *United States* v. *Bentvena, supra* note 3, at 928; *United*

States v. *Aviles*, 274 F. 2d 179, 190 (2 Cir.), cert. denied sub nom. *Evola* v. *United States*, 362 U. S. 974, 982 (1960). By contrast, in *United States* v. *Koch*, *supra* at 983, this Court found no evidence that seller and buyer had any "agreement to advance any joint interest." The fact that this inference rests upon circumstantial evidence and that other inferences may be possible does not, of course, condemn it. *United States* v. *Valenti*, *supra* note 2. Nor is the fact that it was not shown that Rogers dealt with Aiken determinative, as the jury could have found that he must have known that the conspiracy involved others than Davis. It is clear that one conspirator need not know all the others who are shown to be members of the conspiracy. Cf., e.g., *United States* v. *Agueci*, *supra* at 826-27.

The convictions are affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1286

LEONARD ROYALL AIKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2–13) is reported at 373 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1967. A petition for rehearing was denied on March 17, 1967. The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED

1. Whether the trial judge properly permitted a government witness to invoke his privilege against

self-incrimination as to certain questions asked on cross-examination.

2. Whether petitioner's constitutional rights were violated by the absence of a preliminary hearing.

3. Whether the court's instruction regarding the statutory presumption created by 21 U.S.C. 174 constituted an impermissible comment on petitioner's failure to take the witness stand.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense * * * the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

A nine-count indictment charged petitioner and eight others[1] with violating the federal narcotics laws (Counts 2–8), and conspiracy to do so (Count 1). Petitioner, named only in the conspiracy count, was convicted by a jury in the United States District Court for the Southern District of New York. On August 10, 1966, he was sentenced to imprisonment for twenty-five years and fined $20,000. The court of appeals affirmed (Pet. App. 2–13).

The evidence showed that, during 1963 and 1964, petitioner was the head and co-defendant Leroy Davis his second in command of an organization engaged in large-scale distribution of narcotics in New York City, particularly in Harlem. Other co-defendants received their supplies of narcotics from Davis or petitioner, diluted them, and distributed them for profit.

A distributor, Edward Walker, testified that in the early part of 1963 he traveled with petitioner and Davis to a building located in the Bronx. When they reached their destination, Walker remained in the automombile, petitioner maintained a surveillance, and Davis entered the building, later emerging with two foot-lockers containing narcotics. Walker and Davis loaded the trunks in the car, after which they drove away (Tr. 2996–3005).[2] A few weeks later, at

[1] Five defendants were tried with petitioner: Webster Bivens, Charles Cole, Leroy Davis, Nolan Johnson, and Clifford Rogers. All but Johnson were convicted of one or more counts. The remaining three defendants, George Henderson, Ronald Scott and Raymont Spratley were severed and testified for the government at the trial of their co-defendants.

[2] Citations are to the trial transcript, filed with the Clerk of this Court.

a bar in Harlem, Davis told Walker that he needed help later that evening. Davis explained that he wanted Walker to assist him when he made deliveries of narcotics. Asked by Walker what pay he would receive, Davis replied that he did not know, but would have to ask petitioner (Tr. 3010). On three different evenings, Walker, accompanying Davis on his rounds, placed packages at various locations, and then waited to see that they were picked up (Tr. 3011–3012). In February or March 1963, at petitioner's behest, Walker was sent to Chicago, where he delivered a quantity of narcotics to a prearranged address (Tr. 3018–3024). On his return, Walker met petitioner, who asked if everything had gone well. Walker replied affirmatively (Tr. 3024). In March 1963, Walker assisted petitioner in diluting and bagging narcotics (Tr. 3026–3045).

In March 1963, George Henderson, one of the severed defendants, met petitioner at a bar in Harlem. Henderson gave petitioner $225, and requested a half-ounce of heroin. Petitioner told Henderson to wait a short while. That evening, at the bar, Davis approached Henderson and suggested that they meet at a certain street corner. Later that evening, Davis delivered the heroin to Henderson at the prearranged location (Tr. 1020–1027). From that time until August 1963, Henderson obtained his narcotics from co-defendants Webster Bivens or Charles Cole (Tr. 1035–1114). In September, Henderson bought narcotics from Davis and sold it to an undercover agent of the Federal Bureau of Narcotics (Tr. 1123–

1134). Henderson made a second sale to agent Peterson in November 1963 (Tr. 1135–1136).

After November, Henderson was in almost daily contact with petitioner. In December, he gave petitioner $900 to purchase two ounces of heroin, subsequently delivered by Davis (Tr. 1136–1140). Two weeks later, petitioner settled a dispute between Henderson and Davis involving the quality of some narcotics purchased by Henderson from one of Davis'. associates. Henderson overheard petitioner tell Davis to have his associate give Henderson another ounce of heroin in settlement (Tr. 1140–1146, 1229–1235). Henderson was arrested in February 1964, and thereafter agreed to cooperate with the Bureau of Narcotics (Tr. 1146).

In May 1964, co-defendant Ronald Scott met petitioner at a Harlem bar. He *told petitioner* that he had recently left prison; that things were not going too well; but that he had made contact with someone from out of town who had expresssed willingness to purchase narcotics from him. Petitioner advanced Scott $700, and said that he would keep Scott in mind. The next month, Scott discussed his financial problems with Davis, who advanced him $100 (Tr. 2414). A week late, Scott returned $800 to Davis, and indicated his hope that the repayment would hasten matters (Tr. 2424–2426). In July 1964, Scott made his first purchase of narcotics from Davis (Tr. 2444–2445). A few days later Scott attempted to transact a sale of narcotics with his out-of-town contact. The value of the narcotics, to be obtained from petitioner and Davis, exceeded $17,000. Scott was arrested be-

fore the transaction was completed; his "out of town contact" was agent Peterson (Tr. 2450–2472).

ARGUMENT

1. At trial, Edward Walker testified at length for the government. He responded to several introductory questions about his background, and then described how he assisted petitioner and Davis in the distribution of narcotics from January to March 1963. He also admitted having a prior conviction for conspiracy to deal in narcotics, and stated that he had used cocaine on three or four occasions (Tr. 2991, 3033). On cross-examination, counsel for Davis concentrated on the circumstances surrounding Walker's arrest on unrelated charges in March 1965, at which time a search of his apartment uncovered a pistol. When asked by counsel whether the gun was his, Walker refused to answer, and the court sustained his right to assert his privilege against self-incrimination (Tr. 3057). Thereafter, counsel posed numerous questions regarding the circumstances surrounding the 1965 arrest. In most instances the court permitted Walker to invoke his privilege (Tr. 3059–3081, 3091–3127).[3] During the cross-examination the judge twice advised defense counsel that he would limit this line of questioning because counsel was inquiring into a collateral matter, occurring two years after the events described by Walker on direct examination (Tr. 3104, 3114). The court explained to the jury (Tr. 3142):

[3] On a few occasions the court determined that Walker had improperly refused to reply to a question, and ordered him to answer (Tr. 3118, 3119, 3167).

> He has no privilege at all upon anything that he has testified to which touches on this case. He must answer. But these matters which are directed towards his credibility and which have nothing to do with the incidents in our case, he may stand on his constitutional right and refuse to answer any question which will incriminate him.

Such rulings did not improperly curtail petitioner's right of cross-examination. The questions involved collateral matters and exceeded the legitimate bounds of cross-examination by attempting to delve into facts surrounding Walker's 1965 arrest. The court, exercising its discretion, set reasonable limits on the scope of cross-examination, and properly restricted tangential inquiries in an already lengthy trial. *United States* v. *Marks*, 368 F. 2d 566 (C.A. 2), certiorari denied, 386 U.S. 933; *United States* v. *Kahn*, 366 F. 2d 259 (C.A. 2), certiorari denied, 385 U.S. 948; *United States* v. *Irwin*, 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967.

2. On November 2, 1964, petitioner was taken before a Commissioner who set bail (which petitioner posted). Over his objection the preliminary hearing was postponed (R. 107–119). An indictment was returned on December 18 and no preliminary hearing was held.

Relying upon decisions of the District of Columbia Circuit,[4] petitioner argues that he was denied a fair

[4] *Ross* v. *Sirica*, No. 20, 535, and *Blue* v. *United States*, 342 F. 2d 894, certiorari denied, 380 U.S. 944. Contrary to petitioner's statement (Pet. 11), the government did not petition for certiorari in *Blue*. The petition was filed by Blue, whose conviction had been affirmed.

trial because he did not have the opportunity for discovery which a preliminary hearing would have afforded. Aside from the special province of the court of appeals to fashion rules for that circuit, petitioner's reliance on those cases is misplaced. They hold only that an accused may compel a preliminary hearing if he seeks it. While the judges of the District of Columbia Court of Appeals conflict in their opinions as to the precise functions served by preliminary hearings, all are in accord that where, as here, the defendant fails to take the remedial steps outlined in *Blue* before trial, reversal of a conviction is not appropriate unless there is some basis for concluding that the trial itself was prejudiced by the lack of a preliminary hearing. *Shelton* v. *United States,* 343 F. 2d 347, certiorari denied, 382 U.S. 856; *Blue* v. *United States, supra.* Clearly, petitioner has made no such showing.

3. As part of his detailed closing instructions (Tr. 4180–4296), the trial judge charged that, according to the underlying statute, one of the elements of the offense charged, knowledge that the narcotics were illegally imported, could be inferred from possession of the narcotics unless the defense explained such possession to the jury's satisfaction. Petitioner did not object to this instruction at trial; he now alleges that it constituted an improper comment on his failure to testify. To the contrary, a reading of the court's instructions in their entirety shows that the court's reference was "carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand."

United States v. *Gainey*, 380 U.S. 63, 71. Indeed, the court advised the jury that where a defendant had not testified (Tr. 4248):

> * * * you may not consider this against him as a basis either for a presumption or an inference unfavorable to him. He is exercising his constitutional privilege. You must not permit such fact to weigh in the slightest degree against the defendant, nor should it even enter into your discussions or your deliberations.

See *United States* v. *Armone*, 363 F. 2d 385 (C.A. 2), certiorari denied, 385 U.S. 957.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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